

## REASONS

FOR THE

## Reversal of the Decree

AGAINST

Mrs. *BERTIE*, and her Sons.

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**I**T's proved that she was Heir, beloved by her Uncle, declared that she should be, as in Conscience she ought, his Heir; and by all former Wills had the Estate without restriction; and by this, upon condition she marries the Lord *Guilford* within three Years, with Limitations over, &c.

She goes within a Fortnight to the Lady *Wiseman's*, in obedience to the Will, prefers her Bill in *Chancery* against all the Parties concerned, praying an Execution of the Trusts, and offering to marry the Lord G. according to the direction of her Uncle's Will; sends a Writing under her Hand, that she would marry him when came of Age of Consent, or sooner if her Friends should advise her, and that she would marry no other Person; and this without any reference to Terms of Settlement, &c. always declares herself willing, pleased at the naming him, feared it should break on his part. Then she is delivered into *Chancery* by the Lady *Wiseman*; she prays to be continued there, which is refused; then she is put into the Possession of Mrs. *Fiennes* against her will; then she desires to be with the Lord *Griffin*, which is denied, and he is ordered to carry her to the Lady *Hickman's* at *Gainsborough*, 100 Miles from *London*, and ordered by the Chancellor not to marry but upon Terms; there she is kept for an Year and half till the three Years expire; the Lord G. never made any application to her by Word or Writing, by himself, or by any others by his Authority or Order.

Now the Question is, Whether that very Court which thus restrain'd her, shall judge her to have fail'd in her Duty to her Uncle's Will.

'Tis true, that the Lord G's Trustees did make an offer, but not by his Authority; and 'tis true, that her Trustees and the *Chancery* did insist upon Terms which the Will did not impose.

But

conclusion

R. H. 1711

plainly for

Chancery



But then it is insisted on, That this Lady hath done all that was consistent with the modesty of a Maiden, and the honour of a Person of her Quality ; and this was owned by the Two Chief Justices. Now here's no refusal on her part, her offer from the Lord G. The Act of her Trustees shall never prejudice her ; the Act of the Lord G's. Trustees can never bind him, in a matter of Marriage, which is a personal thing ; then her tender Years and her Sex are to be considered ; here's a moral impossibility upon her to do more ; she was, as it were, in Custody, she could not travel of her self an 100 Miles against the consent of her Keeper or Guardian ( who was answerable for the Possession of her Person to the Court of *Chancery* ) to find out the Lord G. to Sollicit and Court him.

Then it is to be consider'd, how Equity is to proceed in this Case : By the Civil Law, or Law Natural, which is the Common Reason or Sense of Mankind in general : In case of a mix'd Act, which requires the concurrence of another person, to be willing and to do that which lies in her power, is all that is required by such a condition ; there's no Rule of the Common-Law that obliges in this matter, it being a Trust, which the Common-Law cannot intermeddle with ; so that the measure of judging in this Case, must be that of right Reason, which is to fulfil the meaning of Testator as far as may be done by his Heir and Legitary. It can never be presumed that he intended it should be in the Lord *Guilford's* power ( to whom no Estate is given, ) to deprive his Heir of her Inheritance, or that the Orders of *Chancery* ( which are irresistible by Infants, especially in the Intervals of Parliament ) should lose her Title to this Inheritance : It can't be presumed that he could foresee these subsequent accidents ; and therefore Equity ought to do that which in Reason he may be thought to have done, in case he had known what afterwards happened.

In all conditions there's a tacit condition implied, that it be possible ; and this is no condition precedent, for that she was Heir, and there was a trust for her after the Debts paid till the End of the Three Years.

There's no Precedent for this Decree, because there never was such a case before ; and the Devise over cannot alter the case ; for notwithstanding that, 'tis agreed that such accidents may happen, as though that condition be not performed, the Devise over shall not take place.

'Tis not a settled fundamental Rule in Equity, that Trusts are always to be governed by the strict Rules of the Common-Law, as appears in many instances ; but Reason and Conscience are to guide, as the circumstances of the Case in Question shall happen to be.

It is agreed, that if the Marriage had happened after the 3 years, she should have enjoy'd it ; and yet this is as much the making a new Will as can be in our Case ; 'twas as much his Will that it should be within that time, as that it should be at all ; 'twas agreed, that if by means of the remainder men the Marriage





riage had been prevented, she should have kept the Estate; and yet the Words of the Will are as strong, (if the words must be pursued) that if there be no Marriage, it shall go over; so that Equity doth not always follow the meaning of the Testator in a Trust according to the Words, but according to Accidents, and the Equity which arises upon them.

In *Walter Overbury's Case* in the Delegates, in *Charles* the 2d's time, 'twas held, That if a single Man, by his Will, gave the Overplus to his Brother, and after Married, and had a Child, that then such Overplus should go to them, because at the time of making the Will he did not foresee that Event, and Equity must dispose of his Estate as he in Reason may be thought to have willed, if the Event had happened before.

But 'tis objected, That this concerns a Personal Estate in a Will: And Sir *Matthew Hale* observed, it belongs *ad alienum forum*, and in those Cases the Rules of that Law ought to guide; but I say, Trusts do as much belong *ad alienum forum*, *i. e.* to a Form different from the Common-Law, as Personal Legacies; and the Civil-Law holds the same Rule for Inheritances as for Goods.

But 31 *Hen. 6. Fitch, tit. subpoena, pl. 23.* and *Shelley's Case*, 1 *rep. 100.* is the Case of Land. A Man seized in fee, enfeoffs another, and declares the use to his Daughter, and afterwards hath a Son born, the *Chancery* shall order it to the Son, because of the Intent implied, or the tacit Condition supposed in his declaring the use, *i. e.* things standing as they are, supposing no Accidents; now this last destroys the pretence of a Distinction between Land and Goods. Besides, Equity and Reason is the same as to the Meaning and Actions of the Parties, let the Subject-matter of the Bequest be what it will, whether Inheritance or Money.

And the Limitation to the first Son, will be under the same Circumstances as that to the Mother, for 'tis her Son, and Mr. *Cary's* Heir, and 'tis a Son by her first Husband, and so supposing the Rules of Reason and Equity, which we contend for, the same will extend to both; for such first Son by her first Husband will derive from the Mother all that either Heirship, or an equitable, reasonable Construction of this devise of the Trust gives to her: Nor can the Reversal of this Decree be of any dangerous Consequence in any other Cases; for that this is never like to happen again, and if it should in every Circumstance, it ought in Conscience and Reason to be governed by the same Rule.

*For which Reasons it is humbly hoped, That this Sole Daughter and Heir of the Lord Willoughby of Parham, Niece and Sole Heir of the Testator, and one whom he in his Conscience thought should and ought to be his Heir, shall not lose this Inheritance from her self, and Son begotten by the Second Son of a Noble Peer; when 'tis owned she did as much as possible towards a Marriage with the Lord Guilford, and was prevented by a moral Impossibility put upon her by that very Court, under whose Power and Ordering her Person, and Maintenance, and Place of Residence, and Servants, and the like, were; and under whose Judgment her Estate and Title in question, now are.*